Editor's note: 86 I.D. 234; Appealed – dismissed, sub nom. Lamp v. Andrus, et al., Civ.No. 80-171-M (D.N.M. July 17, 1981)

MILTON D. FEINBERG

BENSON J. LAMP

(On Reconsideration)

IBLA 77-414 Decided April 11, 1979

Reconsideration of Board decision, 37 IBLA 39, 85 I.D. 380 (1978), reversing a decision of the New Mexico State Office, Bureau of Land Management, dismissing a protest against the award of any priority rights to the successful drawees of one simultaneous oil and gas lease drawing, and dismissing an appeal from a rejection of an oil and gas lease offer for failure to accompany the drawing entry card with the agency statement required by 43 CFR 3102.6-1. NM 29826.

Decision reaffirmed.

1. Administrative Authority: Generally–Administrative Practice–Bureau of Land Management–Oil and Gas Leases: Applications: Drawings

Established and longstanding Departmental policy relating to the administration of

the simultaneous oil and gas leasing system, premised upon regulatory interpretation, is binding on all employees of the Bureau of Land Management, until such time as it is properly changed.

2. Oil and Gas Leases: Applications: Generally--Oil and Gas Leases: Applications: Drawings

The essential requirement of the simultaneous oil and gas leasing system is that all properly filed offers be afforded equal opportunity to obtain a lease. Where a system effectively excludes a lease offer from consideration, such a system is arbitrary and capricious.

APPEARANCES: James W. McDade, Esq., McDade and Lee, Washington, D.C., for appellant Lamp; David H. Wiggs, Jr., Esq., and Darrell K. Windham, Esq., Kemp, Smith, White, Duncan & Hammond, El Paso, Texas, for appellant Feinberg; William R. Murray, Jr., Esq., Office of the Solicitor, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

On February 8, 1977, a drawing entry card (DEC), for one Benson J. Lamp was drawn with first priority for parcel No. NM 396 in the Bureau of Land Management (BLM), simultaneous oil and gas lease drawing in New Mexico. The offer was assigned serial number NM 29826. On March 9, 1977, the New Mexico State Office, BLM, issued a decision requiring additional information as a prerequisite to the issuance of the oil and gas lease.

Certain entry cards, however, had been excluded from the original drawing, and another drawing had been held on February 15, 1977, which included all of the entry cards. The offer of appellant Milton D. Feinberg was drawn with first priority at this new drawing. Under instructions from the BLM Director's Office, appellant Feinberg was given no priority inasmuch as his card had not been one of those originally excluded from the drawing. On March 2, 1977, appellant Feinberg protested the issuance of the oil and gas lease to appellant Lamp, arguing that the results of the second drawing should control leasing priorities. On April 6, 1977, the State Office dismissed Feinberg's protest.

On that same date, appellant Lamp submitted evidence in response to the State Office decision of March 9, 1977. By decision of April 27, 1977, the State Office rejected Lamp's lease offer because the offer had not been accompanied by the statement required by 43 CFR 3102.6-1.

On May 7, 1977, appellant Feinberg filed a notice of appeal from the April 6 decision dismissing his protest. On May 12, appellant Lamp filed a notice of appeal from the April 27 decision of the State Office.

By decision of September 18, 1978, 37 IBLA 39, 85 I.D. 380, this Board reversed the decision of the State Office rejecting appellant

Feinberg's protest and dismissed the appeal of appellant Lamp. The Board's decision was premised on two discrete factors: 1) the procedures adopted by the Director, BLM, were contrary to longstanding Departmental policy and were thus a nullity; and 2) even assuming that the Director, BLM, was vested with the authority to change such policy, the drawing procedures adopted by the Director were arbitrary and capricious.

On November 10, 1978, counsel for appellant Lamp requested that the Board reconsider its decision. Subsequently, the Office of the Solicitor filed an appearance on behalf of the Bureau of Land Management and similarly requested reconsideration of the Board's decision. By Order of December 13, 1978, the Board granted the petition and afforded all parties a further opportunity to file briefs with the Board. Attorneys for appellant Feinberg thereupon filed a brief in support of the original decision. We have carefully considered the matters raised in the respective briefs, and while we feel that some elaboration and clarification of our original decision is necessary, we are nevertheless of the opinion that our earlier decision correctly decided the instant appeal. Accordingly, we reaffirm that decision for the reasons set out below.

Our decision of September 18, 1978, was grounded on two separate bases. In order to fully analyze the arguments made on reconsideration we will examine these justifications seriatim.

[1] The first point of our original decision was that prior Departmental policy required that a new drawing be held to establish priorities where a drawing entry card had been omitted from the drawing. Id. at 42-43, 85 I.D. at 381-82. It having been established Departmental policy, the Board accordingly held that the Director, BLM, was without authority to change this policy.

Both appellant Lamp and the Solicitor attack this analysis for a number of reasons. Both admit that past practice required the holding of a new drawing to establish priorities where a drawing entry card had been omitted from the original drawing. Both argue, however, that this was not Departmental policy, but rather was merely a Bureau policy which was the subject of Departmental approbation, and was therefore amenable to change at the Bureau level. As the brief for the Office of the Solicitor contends: "The redrawing procedures were a program decision, never codified in regulation, which received legal approval at the Departmental adjudication level." Solicitor's Brief at 6.

Appellant Lamp argues further that both the Federal Land Policy and Management Act of 1976, Act of October 21, 1976, 90 Stat. 2744, 43 U.S.C. § 1701 et seq. (1976), and the Departmental Manual (see 235 DM 1.1A), provide the BLM Director with the authority to establish Departmental policy over matter within his jurisdiction. Additionally, appellant Lamp contends that the changes which the Director,

BLM, sought to effectuate had been recommended by the Office of Audit and Investigation, and approved by the Assistant Secretary for Land and Water Resources.

As regards these last contentions, the Solicitor's Office expressly noted its disagreement with the position of appellant Lamp:

> The Lamp petition suggests that the Director's action here is beyond the jurisdiction of the Board. The Lamp petition also argues that the Board cannot review procedures which are based on a report of the Office of Audit and Investigation (OAI). This would give such reports the status not only of legal determinations but also of Secretarial decisions. Such an interpretation is contrary to Departmental policy. All legal functions of the Department are delegated to the Office of the Solicitor, the Office of Hearings and Appeals and the Office of Congressional and Legislative Affairs. See Secretarial Order No. 3023. The alleged silent endorsement of the Assistant Secretary, Land and Water Resources, cannot elevate recommendations of OAI to the status of Secretarial decisions.

Solicitor's Brief at 5-6.

Initially, we wish to make it clear that we agree that not every decision in which this Board affirms actions of the BLM establishes Departmental policy. There are numerous areas in which BLM can properly select from a wide range of possible actions in attempting to carry out a desired policy. Affirmation by IBLA does not cement such a free policy choice into Departmental policy which can only be altered at the Departmental level. It merely represents appellate

concurrence that the selected option was reasonable and not contrary to law or regulation.

On the other hand, when the appellate Boards of OHA interpret regulations, statutes and Departmental policies as requiring or prohibiting certain actions, such interpretation establishes Departmental policy which is fully binding upon the Bureau until such time as it is altered by competent authority.

The crucial line of demarcation relates to the extent to which the Board's decision is premised on interpretations of statutes, regulations, and Secretarial policy statements, as opposed to consideration of a range of policy options, any one of which might be permissible. Our original decision failed to explicate fully the original basis for the various decisions which held that the omission of a DEC necessitate a new drawing in which all offers are included to establish priorities.

As such an analysis will show, the Department's policy has always been premised on the wording of the regulations relating to simultaneous drawings. Moreover, the applicable regulations have not been substantially altered since the original decisions.

In Max H. Christensen, A-29703 (September 17, 1963), the Assistant Solicitor noted an argument, pressed by the appellant therein, that

under the mathematics of probability a successful offeror in a first drawing has less chance to be drawn first in the second drawing than do other offerors. He rejected this argument, noting: "As the Bureau has pointed out, regulations 43 CFR 192.43(e) and 295.8 expressly provide for a drawing to determine an applicant's priority and not a series of drawings. Thus the mathematics of probability cannot control this situation since the result would be a drawing procedure contrary to the regulatory provisions." (Citations omitted; emphasis supplied.)

This position was restated in Leonard H. Treiman, A-29579 (October 4, 1963), wherein the Assistant Solicitor expressly declared: "There may be other methods of handling situations where offers are omitted from drawings but in the absence of a change in the regulations they may not be applied to drawings held under the existing regulations." (Emphasis supplied.)

The regulation to which these two decisions refers was originally found at 43 CFR 295.8 (1963). The regulation provided, in relevant part:

> Unless otherwise provided in a particular order, or regulation, applications which are filed simultaneously will be processed in accordance with the following rules:
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> (a) All such applications received will be examined and appropriate action will be taken on those which do not conflict in whole or in part.

> (b) All such applications which conflict in whole or in part will be included in a drawing which, except as provided in paragraph (c) of this section will fix the order in which the applications will be processed.
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> (1) Notwithstanding the provisions of paragraph (a) of this section, the priorities of all applications or offers to lease made and filed in accordance with the * * * [simultaneous procedures] of this chapter will be determined by public drawing whether or not they are in conflict.
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> (c) All applications included in the drawing will be subject to any priority to which any particular applicant may be entitled on account of a preference right conferred by law or regulations. [Emphasis supplied.]

While various changes and recodifications have occurred since 1963, the essential thrust of the regulation has remained unaltered. Thus, 43 CFR 1821.2-3(b) now provides:

> Whenever it is necessary, for the purposes of the regulations in this chapter, to determine the order of priority of consideration among documents which have been simultaneously filed, such order of priority will be established by a drawing open to public view. [Emphasis supplied.]

Thus, under well established precedent, the nature of the redrawing which occurs after the discovery of an omitted card cannot be changed absent remedial Departmental action. 1/

1/ That such regulatory amendment was contemplated is made clear in the comments of BLM in response to the OAI report. After discussing various changes which BLM would seek to implement, the following statement appears: "We expect this change to require publication of amended regulations which cannot be accomplished in less than six months. In the meantime, however, we intend to instruct the State

As regards the contentions of appellant Lamp relating to the action, or nonaction, of the Assistant Secretary, we feel that these arguments were best answered in the portion of the Solicitor's Brief set forth supra.

The Solicitor's Brief points out that the past rulings of the Board holding that omission of a drawing entry card voids the drawing are contradicted by two cases which permitted a defective drawing to stand after the discovery of an omitted card. These two cases are Esther Bosworth, A-30903 (April 1, 1968), and John L. O'Brien, A-30416 (April 8, 1965). In the former case, the individual whose card had been erroneously excluded from the drawing had failed to appeal from the rejection of her offer, while in the latter case the applicant had subsequently withdrawn his offer. In both instances the results of the original drawing were validated. The Solicitor therefore argues that a defective drawing in not void but merely voidable.

We need not decide this apparent conflict because even were we to assume that a defective drawing was merely voidable the position of

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fn. 1 (continued)
offices to make this change pending publication of the amended regulations."

Thus, while recognizing the necessity of amending the regulations, BLM nevertheless sought to effectuate the desired result without recourse to the proper procedure. This attempt we hold to be a nullity. See Arizona Public Service Co., 20 IBLA 120 (1975).

BLM would not improve. As the decision in Esther Bosworth, supra, noted: "[I]t is only the omitted offeror's right to participate which would require the first drawing to be vacated. When he no longer has a right to demand a new drawing, there is no reason to vacate the old drawing and hold a new one." Thus, even if the old drawing is voidable, it is voidable at the option of the applicant whose cards have been omitted. In the instant case, no action of the applicant can be described as waiving his right to a new drawing. Indeed, a second drawing was held in this case. Thus, regardless of whether the first drawing is termed void or voidable, it is clear that subsequent actions voided the first drawing. Accordingly, we reaffirm our previous holding as herein explained.

[2] The second basis of our earlier decision was that the new method was arbitrary and capricious. Both appellant Lamp and the Solicitor attack this conclusion. 2/ Appellant Lamp points out that BLM intends in the future to use blanks in place of actual cards and thus the situation to which our original decision referred will not occur. The Solicitor's Office, for its part, concedes that the new

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2/ The Solicitor's Office also requests that, if we reaffirm our first holding we should vacate our second holding contending that it "is not an interpretation of a regulation but a construction of the Secretary's authority to manage the oil and gas leasing program * * *. The Board has considered neither the merits nor deficiencies of alternate redrawing procedures as compared to either the old procedures or the new ones." Our earlier decision, however, was not premised on a weighing of possibilities but an affirmative finding that the specific procedure adopted by BLM was arbitrary and capricious. Thus, we decline to grant the Solicitor's Office request.

system is not a perfect solution, but argues that it does represent "the maximum fairness to the most participants in the drawing."

It is decidedly not the province of this Board to substitute its judgment in matters of policy for the judgment of those to whom policy formulation is entrusted. At the same time, however, when this Board had determined that a policy achieves results that are arbitrary and capricious, it is the duty of the Board to delineate the area of our concern. Upon reexamination of this question, we remain firmly convinced that the new procedures are arbitrary and capricious.

In our earlier decision we hypothesized a situation in which the results of a first drawing were as follows: 1 - Smith; 2 - Jones; 3 - Doe. We then assumed that the DEC of Harris was later discovered to have been improperly omitted from the drawing. A new drawing was thereupon held in which the following priorities resulted: 1 - Jones; 2 - Harris; 3 - Doe. We noted that under the procedures advocated in the instruction memorandum the final priorities would be: 1 - Smith; 2 - Harris; 3 - Doe. This we held to be improper because the effect of the procedure was the essential exclusion of the DEC filed by Jones, who would have no priority even though his DEC was drawn second and first, respectively. We are unpersuaded by appellant Lamp or the Office of the Solicitor that this analysis is erroneous.

The basic predeterminate of the second drawing is an assumption that if the offer omitted in the first drawing had been included in

that drawing it would have been drawn with the priority it attained in the second drawing. Applying this principle to the above hypothetical, when Harris is drawn second it is presumed that he would have been drawn second in the first drawing but for the fact that his card had been improperly omitted. However, if Harris had been drawn second in the original drawing it would still have been possible for the DEC of Jones to have been drawn third. This possibility is totally destroyed by the fact that Harris' DEC substitutes for, and thus cancels, that of Jones. These procedures are completely unfair as they relate to the opportunities of an individual whose DEC is replaced by a DEC which has been omitted from the original drawing since, for purposes of priority, it has virtually ceased to exist.

It is no answer to argue that the individual whose DEC is eliminated from priority is no worse off than one whose DEC was not drawn in the first place. In the latter situation it is the luck of the draw which has determined the result, but in the former case it is the affirmative application of a procedure in an inherently unfair fashion which has defeated an applicant's priority.

There may well be a number of procedures which adequately protect the rights of all participants in a simultaneous drawing. This, however, is not one of them.

As regards the contention of appellant Lamp that BLM will, in the future, use blank cards rather than the completed cards, it is

sufficient to note that this possibility does not alter the essential unfairness of the procedure as described above, but operates merely to cloak it.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the original decision of the Board in the instant matter, reported at 37 IBLA 39, is reaffirmed.

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James L. Burski
Administrative Judge

We concur:

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Douglas E. Henriques
Administrative Judge

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Edward W. Stuebing
Administrative Judge